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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

CALIFORNIA CRANE SCHOOL, INC.,
on behalf of itself and all others similarly
situated

Plaintiffs,

vs.

GOOGLE LLC, ALPHABET, INC.,
XXVI HOLDINGS, INC., APPLE, INC.,
TIM COOK, SUNDAR PICHAI, and
ERIC SCHMIDT,

Defendants.

Case No: 4:21-cv-10001 HSG

**PLAINTIFFS SUR-REPLY TO MOTION
TO COMPEL ARBITRATION**

Hearing Date: September 29, 2022

Time: 2:00 p.m.

Place: Courtroom 2

Judge: Hon. Haywood S. Gilliam Jr.

INTRODUCTION

Plaintiffs respectfully submit this Sur-Reply Brief in response to Defendants' Motion to Compel Arbitration, Docket No. 32, pursuant to the Court's Order of June 16, 2022.

I. Arbitration Has Been Waived by The Parties

By filing suit, Plaintiffs opted out of arbitration, and by filing their Motion to Dismiss for failure to state a claim Defendants accepted Plaintiff's opt-out and waived their right to arbitration by seeking a decision on the merits for the Court to decide.

1 *Newirth v. Aegis Senior Communities*, 931 F.3d 935, 941 (9th Cir. 2019) (“Seeking a
 2 decision on the merits of a key issue in a case indicates an intentional and strategic
 3 decision to take advantage of the judicial forum” in a game of “heads I win, tails you
 4 lose.” *Hooper v. Cash Advance Centers*, 589 F.3d 917, 922 (8th Cir. 2009). On May
 5 22, 2020, the U.S. Supreme Court held that it is error “to condition a waiver of the
 6 right to arbitration on a showing of prejudice.” *Morgan v. Sundance, Inc.*, No. 21-328,
 7 596 U.S. ___, (May 23, 2022). By seeking a judicial decision on the merits, therefore,
 8 Defendants have waived their right to arbitration.

9 **II. The Federal Arbitration Act Exempts the FAC From Arbitration**

10 The “saving clause” of the Federal Arbitration Act (“FAA”) exempts the FAC
 11 from arbitration under Section 2 of the FAA, 9 U.S.C. Section 2, which provides that
 12 “[a] written provision in ...a contract...to settle by arbitration a controversy thereafter
 13 arising out of such contract...shall be valid, irrevocable, and enforceable....save upon
 14 such grounds as exist at law or in equity for the revocation of any contract.”

15 Because Google’s Terms and Conditions (Defendants’ Exhibits A and D to
 16 Decl. Shadd at ¶14 Miscellaneous (a)) designate that California law is controlling
 17 (“ALL CLAIMS ARISING OUT OF OR RELATING TO THESE TERMS OR THE
 18 PROGRAMS WILL BE GOVERNED BY CALIFORNIA LAW...”), California law
 19 governs the interpretation of the contract and the arbitration clause. California law
 20 provides two grounds for revocation of any contract. Both grounds, including 1)
 21 public injunctive relief FAC ¶¶162 a.-i under California Civil Code sec. 3513, and 2)
 22 fraudulent concealment, FAC ¶¶ 158-160, which is a ground for revocation of any
 23 contract under California Civil Code sec. 1689, have been alleged in the FAC.

24 The California Supreme Court’s ruling in *McGill* provides that a contractual
 25 provision such as an arbitration clause that “purports to waive [any party’s] right to
 26 request in any forum such public injunctive relief, is invalid and unenforceable.”
 27 *McGill v. Citibank, N.A.*, 2 Cal.5th 945 (2017) (emphasis added), citing Calif. Civil
 28 Code sec. 3513. Most recently in *Hodges v. Comcast Cable Communications, LLC*,
 12 F.4th 1108, 1114-1116 (9th Cir. December 21, 2022), the Ninth Circuit reaffirmed
 that “non-waivable ‘public injunctive relief’” is exempt from arbitration under the

1 FAA’s saving clause so long as the request for public injunctive relief “aims to
2 restrain future violations of law for the benefit of the general public as a whole, rather
3 than a discrete subset of similarly situated persons, and that does so without requiring
4 consideration of the individual claims of non-parties.”

5 Thus, the allegations of the FAC ¶¶162 a.-i., that seek public injunctive relief to
6 restrain future violations of law for the benefit of the public as a whole without
7 consideration of individual claims of non-parties are exempt from arbitration under
8 California law pursuant to the FAA’s saving clause since the allegations request public
9 injunctive relief that seeks to restrain future violations of law as diffuse benefits to the
10 general public as a whole, rather than to a discrete subset of similarly situated persons.

11 **A. The Clayton Act Section 16 Authorizes Private Parties to Seek Divestiture,
12 a Diffuse Injunctive Relief that Benefits the Public as a Whole**

13 In *California v. American Stores Co.*, 495 U.S. 271, 283-285 (1990), the Court
14 held that Section 16 of the Clayton Act authorizes private parties to sue for injunctive
15 relief, including to seek an order of divestiture for the interest of the diffuse public,
16 and not for a limited discrete class of persons, stating at 495 U.S. 283-285:

17 “Private enforcement of the Act was in no sense an afterthought; it was an
18 integral part of the congressional plan for protecting competition... [Its
19 availability should be ‘conditioned by the necessities of the public interest
20 which Congress has sought to protect.’”]...We hold that such a remedy
21 [divestiture] is a form of “injunctive relief” within the meaning of Section 16 of
22 the Clayton Act.” (Emphasis supplied).

23 Thus, the Court held that Section 16 of the Clayton Act authorizes private suits
24 for divestiture to protect competition that meets the Hodges standards of futurity and
25 “diffuse benefits to the general public as a whole,” Hodges at 1114-1116. Plaintiff’s
26 request for future divestiture of the anticompetitive structure, its request to dismantle
27 the unlawful profit sharing and revenue sharing agreements between Google and
28 Apple, its demands to curtail the unlawful division of markets and to stop the unlawful
payments made to Apple so that it would not compete with Google in search would
serve to benefit everyone in society – consumers, competitors, and all other members
of the general public, by enhancing competition. These remedies are not directed at a

1 discrete class of persons, nor do these remedies involve consideration of the rights and
 2 obligations of non-parties. The Hodges court also confirmed these principles in *Blair*
 3 *v. Rent-A-Center*, 928 F.3d 819, 822-23 (9th Cir. 2019) where it found that the plaintiff
 4 Blair had sought public injunctive relief by demanding a halt to Rent-A-Center's
 5 unlawful pricing structure, a remedy that would affect a future benefit to the general
 6 public at large, not just to the plaintiff. *Hodges* at 1116.

7 Defendants incorrectly argue that the injunctive relief under The Clayton Act
 8 Section 16 is limited to "threatened loss or damage." But the Court in *California v.*
 9 *American Stores*, 495 U.S. 271 at 281-282 specifically rejected that argument, stating:

10 "If divestiture is an appropriate means of preventing future harm, the statutory
 11 reference to "threatened loss or damage" surely does not negate the Court's
 12 power to grant such relief.... The second phrase, which refers to "threatened
 13 conduct that will cause loss or damage," is not drafted as a limitation on the
 14 power to grant relief...."

15 As a private plaintiff, Plaintiff has standing as a member of the public as a
 16 whole that is threatened with loss or damage from Google and Apple's anticompetitive
 17 conduct structure to seek public injunctive relief to restore competitive conditions in
 18 search in the future for the diffuse benefit of the public as a whole, FAC ¶¶162 g.-i.

19 **B. Disgorgement is Forward-Looking Injunctive Relief Meant for the Benefit**
 20 **of the Public as a Whole**

21 The FAC seeks disgorgement of the revenues from search that Google shared
 22 with Apple as future injunctive relief "to preclude Google and Apple from using these
 23 funds in the future as capital available to fund or promote any future agreements
 24 between them "not to compete in the search business or divide it; ...to fund or
 25 promote any future pooling or sharing of profits by Google with Apple;...to fund or
 26 promote future out-of-the-box access by Google to Apple's devices; ...to preclude
 27 Google and Apple from engaging in the anticompetitive conduct alleged herein in the
 28 future." FAC ¶¶162 c.-f.

The FAC's request for disgorgement of the payments made by Google to Apple
 constitutes an important form of injunctive relief that is specifically authorized by
 Section 16 of the Clayton Act. The disgorgement of the payments made by Google to

Apple alleged in FAC ¶¶162 c.-f. is forward-looking “public injunctive relief” in that it is directed to the diffuse benefit of the general public as a whole, not for the benefit of a discrete class of persons. *United States v. KeySpan Corp.* 763 F. Supp 2d 633 (SDNY 2011). (“The primary purpose of disgorgement is not to compensate [discrete victims] ... [but rather to] forc[e] a defendant to give up the amount by which he was unjustly enriched.”).

Indeed, the relief sought would directly benefit the public because the disgorged payments would be paid to the United States Treasury. *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995). (Disgorgement is appropriate if “the funds are being used to fund or promote the illegal conduct or constitute capital available for that purpose”). Disgorgement of the payments Google made to Apple as alleged in FAC ¶¶162 c.-f. is relief for the benefit of the public as a whole in that it seeks removal of the tainted funds from Defendants to preclude their future use for anticompetitive purposes either by payment to the U.S. Treasury or for the public benefit. *U.S. v. KeySpan Corp.* 763 F. Supp 2d 633 (SDNY 2011). As stated in *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936, 1946-47 (2020) 25 : “equity practice [has] long authorized courts to strip wrongdoers of their ill-gotten gains.” Moreover, in *United States v. Paramount Pictures*, 334 U.S. 131, 171-72 (1948) (the Court upheld injunctive relief to deprive the defendant of the fruits of their anticompetitive conduct. Accord, *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968); *United States v. Grinnell*, 384 U.S. 563, 577 (1966); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128–29 (1948); *United States v. Microsoft*, 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) (“[A] remedies decree in an antitrust case must seek to . . . ‘deny to the defendant the fruits of its statutory violation...’”

“Equity relief may include . . . the disgorgement of improperly attained gains.” 2A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Paragraph 325a (3d ed. 2006).

CONCLUSION

For the reasons stated above, Defendants’ Motion to Compel Arbitration should be denied.

1 Dated: June 24, 2022

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